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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 936

YALE TRANSPORT CORP.,

Appellant.

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY TO APPELLEES' MOTION TO AFFIRM

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This brief reply is intended to point out the errors in appellees' motion to affirm.

1. Appellees urge that the appeal presents "no substantial question" because the "determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission" and a decision by the district court that the Commission's order was supported by an adequate factual and legal basis virtually binds this Honorable Court (M. A. 4).* It is

* The symbol "M. A." refers to the motion to affirm followed by the page number. Reference to the Jurisdictional Statement is identified by the symbols "J. S."

hardly necessary to point out that the Commission's powers are not unlimited [*Interstate Commerce Commission* v. *The New York, New Haven and Hartford Railroad Co. et al.*, 31 U. S. L. Week. 4363 (U. S. Apr. 22, 1963); *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83 (1957)] and a determination by a district court that an administrative order is based upon sufficient findings is not apodictic.

2. Appellees incorrectly contend that the Examiner followed the decisional guidelines established in *Childress-Elimination of Sanford Gateway* [61 M. C. C. 421 (1952)], when he concluded that a new service would be created by appellant. This is a piece of parologism which cannot survive a contest with the record (J. S. 33-35). Indeed, the district court recognized the departure from *Childress*, when it refused to decide whether the principles of that case were followed (J. S. 17). Consistency may not be an appropriate restraint upon viable administrative action but when the Commission departs from an established policy or principle, it must explain why [*Florida* v. *United States*, 282 U. S. 194 (1939); *Service Trucking Co.- Extension—Frozen Pies and Pastries*, 86 M. C. C. 98 (1961), (Commissioner Tucker dissenting); aff'd as modified, 88 M. C. C. 697 (1962)], and it failed to do so in this case.

At best, the Examiner's Report was a recondite exposition of a new theory which resembles but rewrites *Childress, supra*. For example, the Examiner said that appellant transported "a substantial number of less-than-truckload shipments" but the tonnage was "light"! Led into a blind alley by this semantic excursion, the Examiner then makes an inductive leap to reach the conclusory decision that mileage savings, alone, foreclosed relief because this was "tantamount to a new service"

(J. S. 34-35). Of course, appellees reject this view and rely, instead, on the equally insupportable finding that appellant was not an effective competitor despite the absence of any evidence as to the operations of appellant's competitors (M. A. 7). Surely, this is not the lesson of *Childress, supra,* nor of subsequent decisions by the Commission.

Mileage savings may indicate, but they do not determine, whether a new service is created. Thus, in *Ace Lines, Inc. Extension—Elimination of Wilmington, Ill. Gateway* [81 M. C. C. 797, 800 (1959)], the applicant combined two authorities and by using Wilmington, Illinois as a gateway (which it sought to eliminate) saved 45 miles. In all, only 58 shipments were shown for the representative period but relief was granted:

> "The evidence is convincing that applicant is actually transporting a substantial volume of the considered traffic from each of the proposed origin points by operating through Wilmington, and is an effective competitor for, if not the principal carrier of, such traffic. Applicant has shown that some economies would accrue to its benefit if it were allowed to operate over the most direct routes available. Such economies indirectly benefit the public through more efficient and economical service and thus constitute, in themselves, a showing of public convenience and necessity in the absence of any showing that applicant could institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers we conclude that the application should be granted."

In *T.I.M.E. Incorporated, Extension—Tucson* (77 M. C. C. 413, 1958), the mileage savings involved 180 miles, 4 hours of running time and an annual volume of freight of 1,938,000 pounds. In the case at bar, the comparable figures for representative operations (except in two instances) were mileage savings of less than 180 (J. S. 24) and a volume of freight, on a projected annual basis through one gateway only (New Haven) of 5,783,859 pounds (J. S. 10). In *T.I.M.E.*, supra, the Commission held that the applicant "transports a substantial volume of traffic" (77 M. C. C. at pp. 414-415) but in this case, three times as much traffic handled by appellant is called "light"! (J. S. 34). Only resort to fiction can reconcile these diametrically opposed results.

3. In the case at bar, contrary to appellees' statements (M. A. 7), there was no showing by anyone that appellant could or would institute a new service or a service so different from that presently conducted as to alter the competitive situation. The policy reason which mandates denial of relief where a service pattern is altered is the need to protect existing carriers. A service can only be "new" if it is different from what has been performed and, accordingly, changes the competitive framework. The record showed that 80% of appellant's shipments were given overnight delivery service and a gateway elimination will not alter that type of performance (J. S. 9) because there is no way to improve that kind of service nor was there any evidence that the 80% record could be improved if the relief sought were granted. Recognizing that there would be no change in the nature of the service accorded to shippers, the Examiner and the Commission put a new gloss on *Childress, supra,* by ruling that any savings in operating time which the Commission thinks excessive, condemns an application (J. S. 34-35)

even if the evidence of record shows that mileage savings will not change the character of service. To be sure, the Examiner and the Commission do propound a factitious "finding" that appellant was "not effectively competing for this traffic" (J. S. 34; M. A. 7) but the record unequivocally contradicts this alleged finding. Certainly there being no evidence of operations by protestants, the Commission had no basis upon where to measure the degree of existing competition and, of course, any prospective change. A "new service" results, classically, when next morning delivery replaces second morning delivery because of mileage savings. Thus, in *England Bros. Truck Line, Inc. Ext.—Alternate Route* (13 Fed. Carr. Cas. paragraphs 34, 528, pp. 40, 375) the Commission (Division 1) said:

> "The question whether or not applicant would be able to offer shippers an essentially different service than it now can offer them, cannot be mechanically resolved by a simple inquiry as to whether a faster service can be rendered over the proposed route. In most cases, use of an alternate route results in some reduction in transit time and thus makes possible, at least in theory, a better service from the standpoint of delivery time. The decisive factor is, necessarily, the degree of improvement in the service, rather than the improvement itself. It is true that the use of the shorter route would allow applicant to deliver shipments on the next morning after departure; however, the record shows that such first-morning service is now being accomplished, and that its advertised delivery time is next-day delivery, which service it performs on 81 percent of the shipments transported * * * Hence, it cannot be said that applicant is now unable to

offer shippers the substantially equivalent of the service offered by protestants between Kansas City and Memphis."

4. The miscellany of decisions, some of them "impossible to reconcile" suggests the need for decision by this Court. (Note *Federal Regulations of Trucking; The Emerging Critique*, 63 Colum. L. Rev. 460, 491-501, 1963).

CONCLUSION

The Motion to Affirm Should Be Denied

May 8, 1963.

Respectfully submitted,

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